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No. 116

In the

Supreme Court of the United States

October Term, 1950

E. FRANK O'HARA, ET ALS,
Appellants

vs.

THE PITTSTON COMPANY,
Appellee

Appeal from the Supreme Court of Appeals
Of the State of Virginia

BRIEF ON BEHALF OF APPELLANTS IN REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUBJECT INDEX

Page

I. Introduction 1

II. There is a Substantial Federal Question 3

A. There Has Been a Taking of Property 4

B. There Has Been No Waiver 10

III. The Merger Statute, as Construed by the Virginia Court, Creates a Bar for the Dissenter Which the Fourteenth Amendment was Designed to Prevent 16

IV. Conclusion 17

TABLE OF CASES CITED

Clearwater v. Meredith, 1 Wallace 25 5

Great Northern Ry. Co. v. Sunburst Oil, 287 U. S. 358, 53 S. Ct. 145 14

Jackson Co. v. Gardiner Investment Co., 200 F. 113 7

Mills v. Central Railroad, 41 N. J. Eq. 1, 2 A. 453 8

Narragansett Electric Lighting Company v. Sabre, 50 R. I. 288, 146 A. 777 ..... 6, 7

Robertson v. Miller, 286 F. 503 12

Spencer v. Seaboard Air Line Ry. Co., 137 N. C. 107, 49 S. E. 96 ..... 8, 9

Swan v. Barnes, 117 W. Va. 147, 184 S. E. 257 15

Tobacco Products v. Plummer, 161 Va. (unreported) 9, 10, 12

STATUTES CITED

Section 1257(2), Title 28, United States Code 2

Code of Virginia, 1950, Section 8-500 2

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I.

INTRODUCTION

This brief is submitted in reply to the Statement of Appellee Opposing Jurisdiction and Moving to Dismiss or Affirm, filed herein (as permitted by Rule 12, Paragraph 3, and Rule 7, Paragraph 3), upon the asserted ground that no substantial Federal question is presented.

The Court is referred to Appellants' Statement As To Jurisdiction, filed herein, for a full statement of the nature of the case, the questions presented, the statute involved, and

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The Court is referred to Appellants' Statement As To Jurisdiction, filed herein, for a full statement of the nature of the case, the questions presented, the statute involved, and

the opinions below. The opinions below are also found in 191 Va. 886, 63 S. E. (2d) 34.

The Statement of Appellee *is predicated solely upon the assertion that no substantial Federal question is raised by this appeal. There is no denial,* however, that appeal is the correct method of review here if the constitutional questions involved are substantial. *There is no denial* that the constitutional questions were properly presented and brought before this Court by the appeal papers. *There is no denial* of the technical jurisdiction of this Court as to this appeal under Section 1257(2) of Title 28, United States Code, approved June 25, 1948.

The appellee erroneously asserts that the Virginia Court of Appeals denied the existence of any constitutional issue, when it rejected the Petition for a Rehearing.

One answer is that the correctness of the court's ruling on the constitutional question raised is the issue here to be reviewed. In the next place, under Section 8-500 of the Virginia Code a rehearing can be granted only ". . . if one of the judges who decides the case adversely to the applicant certifies that in his opinion there is good cause for such rehearing." Thus, the rehearing could be granted only by one of the three judges who decided adversely to these dissenters in the first instance; and the Petition for Rehearing was denied, *not by the court itself,* but only by the refusal of any of those three judges who were the majority in the original decision, to certify good cause. The denial of the Petition for Rehearing was thus brought about, as was the original decision itself, by three judges out of seven, a minority of the Virginia Court of Appeals.

The action of Chief Justice Hudgins in granting this appeal clearly indicates that, in his opinion, a Federal question has been presented.

II.

THERE IS A SUBSTANTIAL FEDERAL QUESTION.

The appellee's argument that no substantial Federal question is presented appears to be based principally on the contentions that the corporate merger proceedings involved are not analogous to condemnation proceedings, that there is no taking of property from dissenters and that the dissenters have contracted away any rights they might otherwise have as to interest.

The appellee does not take exception to the dissenters' contentions that the due process clause of the Fourteenth Amendment requires just compensation be paid when property is taken from a person under state action, without his consent, and that this includes two elements, (a) intrinsic or fair cash value as of the time of taking, and (b) interest on the fair cash value from the time of taking to the time of payment. Appellee seems to rest its argument on the assertion that the Fourteenth Amendment is not applicable, because merger proceedings are not the same as condemnation proceedings. Appellee does not assert that these dissenters have received just compensation.

It is not the purpose of this brief, at this time, to argue the merits of whether these dissenters are entitled to interest or not, but it is the purpose of this brief to demonstrate that this case presents a substantial Federal question which should be reviewed by this Court. In support of that purpose, it is urged that merger proceedings, involving the taking of dissenting stockholders' property, do involve rights guaranteed under the Fourteenth Amendment, and these dissenting stockholders have not waived their rights by any conduct of their own.

A.

There Has Been a Taking of Property.

The Appellee attempts to maintain that there has been no taking of property in the corporate merger proceedings in this case. There is no foundation to this contention. Prior to the merger in 1943, these dissenting stockholders in U. S. Distributing were among the owners of the assets of that corporation. Those assets were property. At the time of the merger, those assets were transferred by U. S. Distributing to Pittston. The certificates of stock held by these dissenters represented a part ownership in assets that were taken from them and given to The Pittston Company, which company, following the merger, had complete title to and control of all the assets formerly owned by the stockholders of U. S. Distributing. That was a taking of the assets of the dissenting stockholder.

It is true, of course, that the merger statute provides that U. S. Distributing, on the vote of the majority stockholders, may so take the assets of the dissenters, even though they do not want to go along with the merger. But it is still a taking of their property, and, under the Fourteenth Amendment, they are entitled to just compensation. This includes two items: (a) the intrinsic value of their share of the assets at the time of taking; (b) interest from the time of taking to the time of payment.

The merger statute recognizes this right, and provides a simple method for measuring the intrinsic value at the time of taking, namely, by appraisal. The Virginia Court of Appeals held it thereby eliminated interest. The stockholders' due process right to just compensation, under the Fourteenth Amendment, gives interest. As construed by the Virginia Court, this statute withholds the element of interest, which

is required by the just compensation rule. That makes it unconstitutional.

The right of a dominant majority to enforce a merger over the wishes of a minority is a purely statutory right. In the absence of statute, this cannot be done. The basic right of a dissenting stockholder to prevent a merger is clearly expressed in *Clearwater* v. *Meredith*, 1 Wallace 25, where Justice Davis, speaking for the Supreme Court, made this statement, relating to the rights of Clearwater, a minority stockholder in a consolidation matter:

> "* * * Clearwater could have prevented this consolidation had he chosen to do so; instead of that he gave his assent to it and merged his own stock in the new adventure. If a majority of the stockholders of the corporation of which he was a member had undertaken to transfer his interest against his wish, they would have been enjoined. There was no power to force him to join the new corporation, and to receive stock in it on the surrender of his stock in the old company * * *" (1 Wall. 41)

There is such a power given corporations in the majority of states today, and the Virginia Merger Statute contains the power exercised in this instance. Under the power granted by the Virginia statute as construed, the interest in corporate assets of a minority stockholder can be taken from him and given to another corporation, without providing just compensation. This surely presents a substantial Federal question.

The power granted to a dominant majority by the Virginia statute, and similar statutes in other states, must be controlled and guided by the requirements of the Fourteenth Amendment. The exercise of this power constitutes an exercise of the power of eminent domain which the legislature

has given to the corporation in which the dissenter holds stock. This is clearly brought out in the *Narragansett Electric Lighting Company* v. *Sabre*, 50 R. I. 288, 146 A. 777, and other cases to be cited.

The *Narragansett* case involved a consolidation by the transfer of assets from the Narragansett Electric Company to the United Electric Power Company. Dissenting stockholders filed motions to prevent the transfer on the grounds that the transfer violated rights guaranteed to dissenting stockholders by the United States Constitution. The Rhode Island Court measured the legislative act granting this power against the Federal Constitution, and found it lawful.

However, in discussing the right exercised by the Narragansett Company, the Court held it to be a taking by eminent domain, as follows:

> "We think it is clear that the legislative intent, as expressed in said act and amendment, was to authorize a taking by eminent domain * * *" (146 A. 780)
>
> "* * * The old company was granted power to condemn, provided two-thirds of the stockholders in interest so voted." (146 A. 784)

While it is true that the Narragansett Company was a utility company, the reasoning of the case—likening the taking of the dissenters' property to the exercise of the power of eminent domain—is applicable to all private corporations. The Narragansett Company was a private corporation and it was empowered to take the dissenting stockholders' interest, because the legislature had deemed it to the public interest that such power be granted. The Virginia Merger Statute, authorizing the merger of similar corporations and the taking of dissenters' property, is likewise an expression that such mergers are deemed to be in the public

interest. In both the *Narragansett* case and the present case, there is a taking of dissenters' property for private purposes which are thought to be in the public interest. In both cases, the old corporation is exercising a power granted by the legislature authorizing it to condemn the property rights of a minority. In the *Narragansett* case, the exercise of this power was measured by the provisions of the United States Constitution, including the Fourteenth Amendment, and was found proper. In this present case, the exercise of this power by the majority stockholders in U. S. Distributing—The Pittston Company being the dominant stockholder—must also be measured by the Fourteenth Amendment. When so measured, the power granted by the Virginia Merger Statute does not, as shown in appellants' Statement as to Jurisdiction, meet the requirements of due process, for it omits one element of just compensation, interest from day of taking to day of payment.

A number of other cases support the view that the taking of dissenters' stock in merger or consolidation proceedings pursuant to the taking power granted the corporation by a state statute is a taking of the dissenters' property in the exercise of the power of eminent domain, and consequently, must be measured by the requirements of the Fourteenth Amendment.

In *Jackson Company* v. *Gardiner Investment Company*, 200 F. 113, the Court considered the rights of a dissenting stockholder in a matter involving the sale of assets of his corporation, and the question arose as to whether he was entitled to intrinsic value or market value of his stock. The Circuit Court of Appeals for the First Circuit expressed itself as follows on this question:

> "Except under rules of eminent domain, no owner of property can be compelled to dispose of it at a mere

> market value; but every one is justly entitled to hold it for its intrinsic value * * *" (200 F. 116)

That statement necessarily carries with it the conclusion that where a statute compels an owner to transfer his property to another corporation on terms fixed by a dominant majority, the power is one of eminent domain and must be governed by the requirements of the Fourteenth Amendment.

In *Mills* v. *Central Railroad*, 41 N. J. Eq. 1, 2 A. 453, a majority of the stockholders of the Central Railroad attempted to lease the property of the Central to the Reading Railroad for 999 years, without the consent of all stockholders. In holding the lease void for lack of consent of the minority, the New Jersey Court said that the minority interest,

> "* * * cannot be taken or controlled *in invitum* except under the right of eminent domain * * *." (2 A. 455)

And in *Spencer* v. *Seaboard Air Line Ry. Co.*, 137 N. C. 107, 49 S. E. 96, involving the consolidation of railroads under North Carolina law, certain dissenting stockholders objected to a consolidation of the Seaboard with another railroad without their consent. The Seaboard answered that the power to consolidate with another was expressly provided by statute. The North Carolina court upheld the consolidation statute as an exercise of the power of eminent domain, saying:

> ". . . the statute conferring the power upon the several railroad companies consolidating expressly provides for paying the dissenting stockholder the full value of his stock at the time of the consolidation. This provision can only be sustained by invoking the right of eminent

domain, and condemning the stock for a public use by making compensation therefor."

* * *

"The legislature, in the exercise of its power, confers upon the majority of the stockholders the power to consolidate with the other constituent companies, and accept in consideration therefor such number of shares in the new or consolidated corporation as may be agreed upon. This can be done only with the consent of the Legislature. The Legislature, having decided that such consolidation was promotive of the public welfare, recognized that it had no power to compel a dissenting stockholder to accept stock in the new corporation. Therefore, in the exercise of the right of eminent domain, it empowers the corporation to condemn the stock of such dissenting stockholders when it cannot otherwise be acquired." (49 S. E. 101)

In Virginia, the case of *Tobacco Products* v. *Plummer*, 161 Va. (unreported), approved as ". . . plainly right . . ." a decision by the Chancery Court of the City of Richmond wherein a dissenter in a sale of assets case was allowed interest on the fair cash value of his stock in the same statutory appraisal procedure involved here. In its opinion in that case, the Chancery Court said:

"What the majority stockholders did was, they lawfully appropriated the dissenting stockholders property to their own and expressed purpose. And the law gives the minority stockholders the right to be paid just compensation for their property thus lawfully appropriated.

"Whether the stock is tortiously taken, or taken under the statute, in either case it is taken against the will of the minority stockholders, the dissenter, and it seems to me that the value of the property, just compensation, should be the same in each case.

* * *

> "Somewhat analogous situations regarding interest are presented courts in condemnation cases where just compensation is to be paid, and the language of Chief Justice Winslow in the case of Appleton v. Railroad Co., 154 Wis. at page 142 so accords with my view on the subject that I repeat it here, said he, 'Just compensation must mean fair and reasonable value at the time the property is taken; just compensation for the property presently taken must necessarily mean, its present value presently paid; it cannot mean its present value to be paid two years in the future *without interest.*' (Italics supplied)
>
> "The cases on the subject of conversion, and condemnation have been cited because the owner of the property converted or condemned is entitled to just compensation, and this is usually arrived at or measured by compensating the person whose property is converted, or condemned, *the fair cash value of the property at the time of the taking with interest from that time.*" (Italics supplied)

Those authorities sustain the appellants' contention that the exercise of this power to merge by the control of a dominant majority takes property from a dissenting minority and must be governed by the same constitutional provisions of the Fourteenth Amendment which control the exercise of the power of eminent domain. Unless these dissenters have entered into a contractual relationship with the majority which would authorize this taking over their objections, without just compensation, the appellee's denial of the above statement presents a substantial Federal question.

B.

There Has Been No Waiver.

It is true that the Virginia Merger Statute is a part of the contract of these dissenters and that statute, as now con-

strued, requires the payment to the dissenter of fair cash value ascertained by appraisal. While it is thus correct that the dissenter has consented that the intrinsic value as of the day of merger,—one element of just compensation,—is to be measured by appraisal, he is deprived of just compensation if he does not also get the other item of just compensation, namely, interest.

While the dissenting stockholder has waived his right to object to merger, he has not consented thereto, and though he consented that the majority may take his assets even against his wishes, this is a coerced consent;—coerced by the dominant majority because it has the power given to it by the legislature to take his property over his objection for merger purposes. But he did not agree to forego his rights to just compensation, under the due process requirements guaranteed by the Fourteenth Amendment.

The consent which the dissenters gave at the time of their purchase of stock was a mere consent that they would not exercise their equity right—as demonstrated in the *Clearwater* case—to block the merger desired by a majority. The consent is merely an agreement by the stockholder that the merger go through on majority approval, but that was to be subject to the dissenting minority being given just compensation under the due process clause of the Fourteenth Amendment.

Furthermore, while these dissenters contracted to have the fair cash value of their stock measured by the appraisal method, in the event they objected to a merger, they agreed to accept this value payable as of the time of the merger, not payable several years after the merger; and also subject to just compensation, as required by the Fourteenth Amendment, carrying interest from the day of taking to the day of payment. If the fair cash value was not paid at the date of the merger, the dissenters have not in any way waived their

right to interest on this value from the time of the taking to the time of payment. The fair cash value, while not fixed until subsequent to the merger, was ascertainable by acceptable standards and consequently would accrue interest. *Robertson* v. *Miller,* 286 F. 503, affirmed 266 U. S. 243, 45 S. Ct. 73.

As pointed out in the *Robertson* case:

> "* * * One who has the use of money owing to another justly may be required to pay interest from the time the payment should have been made. * * *" (266 U. S. 257)

The dissenters, while contracting to have the fair cash value measured by appraisal, as of the date of the merger for their stock—a definite, liquidated amount to be determined by standard procedure—must be deemed to have contracted that their rights to interest on this sum during the litigation required under the statute, be governed by the customary rules of interest fixed by due process requirements of just compensation.

That the dissenters did not waive the interest under the due process clause is shown in another way.

At the time these dissenters acquired their stock, the fair cash value provision of the Virginia sale of assets statute applicable to corporations had been construed to allow interest on that value, in a statutory appraisal procedure like the one in the present case. While Justice Eggleston, in his opinion below, did attempt to distinguish between the merger case here and the sale of assets case involved in *Tobacco Products* v. *Plummer,* 161 Va. unreported, the fact remains that in 1934, the Virginia Court of Appeals had affirmed as "* * * plainly right * * *", a lower court decision in the *Tobacco Products* case allowing interest during an appraisal

procedure to determine the fair cash value of dissenters' stock.

In his minority opinion here, Chief Justice Hudgins emphasized that the Virginia Court of Appeals had previously decided that interest must be allowed from the date of merger until payment on the fair cash value of dissenters' stock determined by appraisal procedure. As to whether such interest should be allowed, the Chief Justice stated that

> "In my opinion this is not an open question in Virginia. To substantiate this conclusion, I am citing below decisions of this court and other authorities indicating that pursuant to the former construction of the merger statutes, dissenting stockholders were entitled to receive interest on the fair cash value of their stock from the date of the merger until paid." (53 S. E. (2d) 44)

Chief Justice Hudgins then recited the Chancery Court's opinion in the *Tobacco Products* case, after which he continued as follows:

> "I have adopted the unusual course of quoting at length from the opinion of Judge Moncure and the order of this court refusing to review the case in order to remove all doubt of the fact that the same argument advanced in this case against the allowance of interest from the date of the merger was advanced in the Tobacco Products Corporation case and was rejected by unanimous vote seventeen years ago.
>
> "In 21 V. L. R. p. 825, Judge Moncure's opinion in this case was discussed at length, and additional reasons were given for approval of what is there referred to as the 'Virginia Doctrine.' The article concludes as follows: 'The instant decision, therefore, appears to be eminently sound in holding that the stockholder becomes a creditor of the corporation as of the appraisal date, and that the obligation bears interest from that time.' "

A fundamental principle of contract construction is that the parties are presumed to have bargained with each other on the basis of existing law, including the judicial construction theretofore placed on a statute. *Great Northern Ry. Co.* v. *Sunburst Oil*, 287 U. S. 358, 53 S. Ct. 145. In the *Sunburst Oil* case, the Supreme Court, in interpreting contract rights where a state court had reversed itself on an interpretation of state law, pointed out that the first decision of the state court—

> "* * * was law until reversed and would constitute the governing principle for shippers and carriers who, during the period of its reign, had acted on the faith of it."

Further, in the *Sunburst Oil* case, this court stated that the parties involved in the litigation

> "* * * would be presumed to bargain with each other on the basis of existing law." (287 U. S. 362)

As Virginia law allowed interest on fair cash value of a dissenter's stock during appraisal proceedings, at the time these dissenters purchased their stock, their contract must be construed in that light. Consequently, it cannot be said that the dissenters have waived their right to interest, or have contracted away their property for less than the just compensation guaranteed by the Fourteenth Amendment.

So far as these dissenters are concerned, the situation is as if the merger statute had been altered, subsequent to their becoming stockholders, to deny interest on the fair cash value, which the dissenter was entitled to under the Fourteenth Amendment. This presents a situation analogous to cases where a statute is enacted after a stockholder has acquired his stock, authorizing a merger or consolidation

upon payment to a dissenter of the market value of his stock. In such cases, as pointed out in *Swan* v. *Barnes,* 117 W. Va. 147, 184 S. E. 257, the theory of eminent domain is relied upon to support the merger.

The *Swan* case, referring to an annotation in 1 L. R. A. (N. S.) 604, which collates cases of this nature, pointed out that they

> "* * * proceed upon the theory of eminent domain, and reason that the shares of the dissenting stockholders, which are to all intents and purposes condemned, cannot be permitted to stand in the way of a merger or consolidation in the public interest. On this theory, so these cases reason, the shares were acquired subject to be taken from the stockholder for public use upon just compensation being made under the law. * * *" (184 S. E. 259)

Had the Virginia Merger Statute been passed subsequent to these dissenters' purchase of stock, the action of the dominant majority would clearly have been in the exercise of a power of eminent domain, and the dissenters would have been entitled to just compensation, including interest. In this case, the merger statute as now construed, denies interest to dissenters, though it provides that the fair cash value as of the day of merger be fixed under the same appraisal procedure before the court in the *Tobacco Products* case, where interest was allowed. ***The statute, as now construed by the Virginia Court, authorizes the taking of dissenters' property under terms and in a manner contrary to those existing at the time of the dissenters' contract. Consequently, this taking is not—and cannot be—pursuant to any contractual relationship, but must be in the exercise of the power of eminent domain. It follows that just compensation, including interest on the fair cash value, must be allowed.***

III.

THE MERGER STATUTE, AS CONSTRUED BY THE VIRGINIA COURT, CREATES A BAR FOR THE DISSENTER, WHICH THE FOURTEENTH AMENDMENT WAS DESIGNED TO PREVENT.

The decision of the Virginia Court, depriving the dissenter of interest required under the just compensation rule of the 14th Amendment, is a deterrent to the dissenter from dissenting, because, invariably, the amount offered is inadequate and the dissenter is left the choice of an expensive litigation without receiving his interest, or agreeing to the merger on the terms fixed by the majority.

This very statute gives the dissenter another handicap, in that it leaves the corporation in the position to offer an inadequate amount for the value of the interest of the dissenter, secure in the fact that if, eventually, it has to pay the true value, it would have to pay that amount only after years of litigation, without interest. The dissenter, on the other hand, is deterred from litigating the inadequate amount offered, because he not only loses the amount of money in the meantime, he incurs the expenses and does not receive any interest for the time that intervenes, even though the corporation itself has the use of the assets and the substantial profits therefrom. The corporation can fight and win in either event, because, in the one instance, it has the use of the money without interest, and, in the other instance, if the litigant gets tired and does not fight, it pays an inadequate amount, such as the original offer, or a settlement thereof. On the other hand, the dissenter himself either must drop the fight and accept the inadequate amount that was offered, or else, have a long litigation, loss of the use of the money in the meantime, and eventually receive only that

which he should have had in the first place, without getting interest, and having had his trouble and expenses besides.

In the case at bar, for example, the amount originally offered was $35.00 per share, while the amount that the appraisers eventually awarded was $57.75, considerably more than the original offer. It has cost the dissenter a substantial sum of money to litigate in the meantime. If he is deprived of his interest, his fight was in vain.

The Fourteenth Amendment was enacted so as to require people to pay just compensation and if the rights of a dissenter are construed so as to be protected by the Fourteenth Amendment, the corporation that takes a dissenter's stock will be induced to make a fair offer in the first place, so as to avoid a litigation wherein it will have to pay interest, and thus be insured that a fair value is paid to the dissenter. That is the purpose of the Fourteenth Amendment, which this decision violates.

IV.

CONCLUSION.

There is no contention on the part of these appellants that this taking was illegal. Admittedly, the merger proceeding—the taking—is lawful, because the dissenter agreed to that by his purchase of stock, but it was subject to the dissenters' right to just compensation under the Fourteenth Amendment. The payment for the dissenters' stock without interest from the time of taking does not meet the requirements of the Fourteenth Amendment, and the dissenters have never agreed by any action to accept fair cash value without interest from the date of taking to the date of payment. They never agreed to accept less than just compensation, which is the intrinsic value plus interest.

The actual merger of the dissenters' corporation with

Pittston is one thing. As to that, the dissenters have agreed that it may be accomplished without their approval. The compensation to these dissenters is another thing, entirely distinct from the merger itself. The merger is a transaction between U. S. Distributing and The Pittston Company. The payment to these dissenters is a matter between them and U. S. Distributing (which obligation Pittston assumed) and must be governed by the requirements of just compensation under the Fourteenth Amendment.

The elements of just compensation include the value of that which is taken, plus interest on that value from the time of taking until the date of payment. The value of that which is taken has been fixed, pursuant to statute, by the appraisal procedure, and, on that value, interest must be allowed until payment is made. There has been no agreement on the part of these dissenters to receive less than what is due them under the provisions of the due process clause of the Fourteenth Amendment.

WHEREFORE, Appellants respectfully submit that the questions involved in this appeal as stated and discussed in the Statement as to Jurisdiction are substantial Federal questions which merit the consideration and decision of this Court.

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